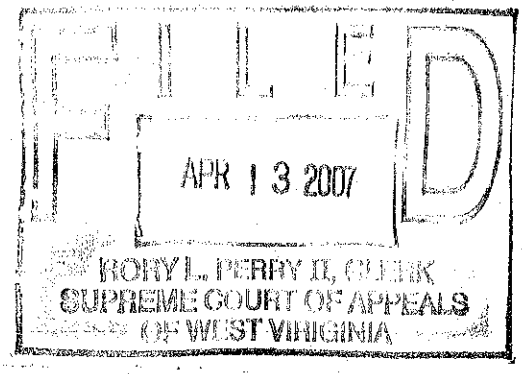
NO. 33304

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

RICHARD ALLEN HAINES,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

On May 9, 2006, a Hampshire County Grand Jury indicted Richard Allen Haines (hereinafter "Appellant") for delivery of methamphetamine, a Schedule I controlled substance, in violation of West Virginia Code § 60A-4-401(a)(ii). (Record [hereinafter "R."] at 1.) On October 12, 2005, after the opening statements of Appellant's criminal trial, the trial court granted the State's motion to amend the indictment to reflect that methamphetamine is actually a Schedule II controlled substance. (Transcript [hereinafter "Tr."] at 21-23.) On October 12, 2005, the Hampshire County jury found Appellant guilty. (Tr. 180.) By Order dated March 9, 2006, the circuit court sentenced Appellant to an indeterminate term of one to five years in the State penitentiary. (R. 321-22.) Appellant now appeals.

II.

STATEMENT OF THE FACTS

On August 26, 2004, Appellant picked up his stepdaughter[1] Katrina Hartman in Keyser, West Virginia. (R. 89.) Sometime earlier, Appellant purchased two baggies of crystal meth. Katrina had asked Appellant to locate crystal meth for her. (*Id.*) Before leaving Keyser, Appellant gave Katrina $50 to purchase marijuana. (*Id.*) After obtaining the marijuana, Appellant and Katrina drove to the Caldwells' home in Levels, West Virginia. (R. 90.) At the Caldwells', Appellant, Katrina, and several other people began to smoke the marijuana. (*Id.*)

Appellant then produced crystal meth in a small plastic baggy and poured its contents onto a plate.[2] (Tr. 86, 117-19.) The plate of crystal meth was available for consumption to the occupants of the house. (*Id.*) Appellant, Katrina, and several people in the home snorted the crystal meth throughout the night. (*Id.*) After partying, Appellant slept in his vehicle parked in the Caldwells' driveway while Katrina stayed inside the Caldwell residence. (R. 90.) The following morning, Appellant woke up and went inside the Caldwell home. (*Id.*) Appellant then produced the baggy of crystal meth from his pocket and put it on the dining room table. (Tr. 119, R. 90.) Appellant and Katrina then snorted the crystal meth. (*Id.*)

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[1]Appellant dated Katrina's mother for many years. Although they never married, Appellant helped raise Katrina since she was a small child and had a very close relationship with her.

[2]Appellant complains that no expert witness or scientific evidence was utilized to prove that the substance he delivered was methamphetamine. This argument is without merit as both of the State's witnesses testified that they consumed methamphetamine that Appellant produced (Tr. 86, 117-19), Katrina's autopsy documented her methamphetamine use (R. 117), and during his statement to police, Appellant admitted he obtained methamphetamine for Katrina (R. 89).

After they consumed the crystal meth, Appellant decided to go for a walk in the woods near Caldwells' property. (R. 90.) Appellant did not return for several hours causing Katrina to leave the Caldwells' to search for him because she was concerned about the high temperature and his history of heart problems. (R. 97-98.) After approximately an hour of unsuccessful searching, Katrina returned to the Caldwells' with a bright red face. (R. 98.) The Caldwells asked Katrina to abandon her search because of the hot temperature and her improper shoes; however, Katrina decided to continue searching. (*Id.*)

When Appellant returned to the Caldwells', he was told that Katrina had just left a few minutes earlier to look for him. (R. 90.) Appellant then left the house to search for Katrina. (*Id.*) According to Appellant, he found Katrina nearby in a briar patch after she had fallen over an embankment. (*Id.*) Appellant was unable to help Katrina up the embankment. Appellant and Katrina then sat at the base of the embankment and laughed at their predicament. (*Id.*) Katrina suddenly died a few minutes later. (*Id.*) The autopsy performed on Katrina revealed that "[p]otentially lethal methamphetamine use was documented and is considered a contributory factor to death." (R. 117.)

After Katrina died, Appellant went to the Caldwells' and 911 was eventually called. (R. 90-91.) The police found Katrina's body in the briar patch. (Tr. 25.) While investigating Katrina's death, the police asked Appellant questions about Katrina and recorded a statement he had made. (Tr. 29, R. 23-53.) During this first statement, Appellant stated that he felt Katrina may have died because "she might have been weak from all the walking because it was hot." (Tr. 33, R. 43.) Appellant also stated that Katrina was healthy and that she "smoked weed a little bit," but he was

unaware of her doing harder drugs. (Tr. 34-35, R. 49-50.) Appellant stated that he did not believe Katrina had consumed any controlled substances that day. (Tr. 36, R. 49.)

The next day, Appellant gave another statement to police in which he admitted Katrina had been consuming crystal meth prior to her death. (Tr. 39-41, R. 63-88.) Appellant stated that while they were driving, Katrina had asked him for $50 which he gave her without asking why she wanted it. (Tr. 39-40, R. 66.) According to Appellant, Katrina purchased the crystal meth and showed it to him sometime later. (Tr. 40-41, R. 66-67.) Upon arriving at the Caldwells', Appellant stated that Katrina offered the crystal meth for consumption. (Tr. 42-43, R. 68-69.)

A few minutes after giving this statement, Appellant gave another statement in which he told police that Katrina had asked him to find crystal meth for her. (Tr. 47, R. 55.) Appellant then admitted that he purchased the crystal meth in Wheeling before he met with Katrina. (*Id.*) Appellant also admitted he took Katrina to the Caldwell residence to consume the crystal meth; however, Appellant denied consuming any of the meth himself. (Tr. 48, R. 56.) On April 15, 2005, Appellant recounted a similar version of the events except that he admitted that he originally purchased two bags of crystal meth and had consumed one of the bags before he picked up Katrina. (Tr. 51, R. 89.)

III.

RESPONSE TO ASSIGNMENT OF ERROR

The lower court did not err in allowing an insubstantial amendment of the indictment after the jury had been seated and opening statements had been completed. Under Rule 7 of the West Virginia Rules of Criminal Procedure, a trial court is granted authority to amend an indictment, and an error in an indictment is not grounds for reversal of the conviction unless the error misled the defendant to his prejudice. Additionally, Appellant did not object to the indictment until after the

trial began, which is contradictory to Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure which requires that defenses or objections based on defects in the indictment be raised before trial. Trial courts are allowed to make amendments to the form of an indictment without resubmitting it to the grand jury.

IV.

ARGUMENT

THE CIRCUIT COURT DID NOT ERR IN AMENDING THE INDICTMENT AFTER THE JURY HAD BEEN SEATED AND OPENING STATEMENTS IN THE CASE HAD BEEN COMPLETED BECAUSE APPELLANT WAS NOT PREJUDICED BY THE AMENDMENT.

In this case, Appellant was originally indicted for delivering "a Schedule I controlled substance, namely, methamphetamine, to Katrina Rae Hartman, in violation of Chapter 60A, Article 4, Section 401(a)(ii)." (R. 1.) During the State's opening statement, the prosecutor stated that Appellant "is charged with the offense of delivery of a controlled substance, methamphetamine, which is a *Schedule II* controlled substance." (Tr. 9; emphasis added.) During Appellant's opening statement, his attorney stated that Appellant is charged with unlawfully delivering "a *Schedule I* controlled substance, namely methamphetamine, to Katrina . . . ." (Tr. 17; emphasis added.)

After opening statements were complete, the State made a motion, out of the presence of the jury, to amend the indictment. (Tr. 20-21.) The State noted that the indictment "alleged that methamphetamine is a Schedule I controlled substance when in fact, it is a Schedule II." (Tr. 21.) Appellant objected because he intended to show the jury that the indictment charged Appellant with delivering a Schedule I substance when methamphetamine is actually a Schedule II. (*Id.*)

The State countered that Appellant should not be surprised by the change since the original indictment specifically cited that methamphetamine was the controlled substance Appellant allegedly delivered. (Tr. 22.) Additionally, the trial court noted that Appellant's attorney had noticed the indictment's error prior to the trial, and never attempted to file a motion to dismiss the original indictment. (*Id.*) The court allowed the indictment to be amended to reflect that methamphetamine is a Schedule II controlled substance. (Tr. 23.) The court reasoned that "[w]e had an additional hearing yesterday and the motion was not made or renewed using this particular ground . . . and [Appellant's attorney] indicated that you knew it then. The Court believes that it is a typographical or clerical error." (*Id.*)

As the trial progressed, the trial court recognized that during opening statements the prosecutor referred to methamphetamine as a Schedule II substance whereas Appellant called it a Schedule I substance. (Tr. 55.) While the jury was outside the courtroom, the trial court asked Appellant's attorney "do you want that corrected for the jury at this time?" (*Id.*) Appellant's attorney declined this offer to explain the inconsistencies in the opening statements to the jury. (*Id.*)

After the State rested its case, the issue of the amended indictment was again discussed away from the jury. (Tr. 130.) The trial court explained that its ruling to amend the indictment was proper because Appellant "wasn't misled in any way." (*Id.*) The court reasoned that the "indictment in this case charged him with delivery of a controlled substance and it was specifically methamphetamine." (*Id.*) Additionally, although the original indictment contained an error, the "Court believes that that was just a clerical error and . . . has no detriment to the [Appellant]." (*Id.*) This is because Appellant "knew exactly what he was here to defend today in this charge and there was no confusion. It was just obviously a clerical error, and it doesn't subject any additional proof on behalf of the Defendant

or any additional defenses." (*Id.*) Finally, the court reasoned that the amended indictment "basically is identical to the charge that was set forth in the [original] indictment, that being delivery of methamphetamine." (*Id.*)

During jury instructions, the trial court told the jury that "[t]he offense charged in the Amended Indictment in this case is delivery of a Schedule II controlled substance." (Tr. 158.) The trial court then instructed "that methamphetamine is a Schedule II controlled substance." (*Id.*)

1. Under Rule 7 of the West Virginia Rules of Criminal Procedure, a Trial Court May Amend an Indictment So Long as it Does Not Prejudice the Defendant.

Under Rule 7(c)(1) of the West Virginia Rules of Criminal Procedure, "[t]he indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . The indictment . . . shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated." Rule 7(c)(3) continues that "[e]rror in the citation or the omission shall not be grounds for dismissal of the indictment . . . or for reversal of the conviction if the error or omission did not mislead the defendant to his or her prejudice."

Trial courts are permitted to amend indictments. Rule 7(e) states that "[t]he court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced." At first blush, this section appears to not apply to this case because Appellant was charged pursuant to an indictment, not an information. However, this Court has noted that although Rule 7(e) is "limited to amendments of an information, [it] can be applied to indictments, as many courts have done." *State v. Adams*, 193 W. Va. 277, 282 456 S.E.2d 4, 9 (1995).

Thus, the indictment in this case did not require resubmission to the grand jury because it conformed with Rule 7(c)(1). Indeed, the indictment contained a concise written statement of the essential facts constituting the offense and listed the citation of the statute Appellant allegedly violated. Although the indictment incorrectly listed methamphetamine as a Schedule I substance, this was harmless error under Rule 7(c)(3) that does not require reversal. The original indictment specified that methamphetamine was the substance Appellant allegedly delivered, and the burdens of proof and criminal sentence are identical for delivery of either Schedule I or Schedule II controlled substances.[3]

Additionally, as Rule 7(e) shows, a court is permitted to amend an indictment at any time before a verdict is rendered so long as no additional offense is charged and the substantial rights of the defendant are not prejudiced. In this case, the court properly amended the indictment under Rule 7(e) because the change was made before a verdict was reached, the amendment did not add additional charges that Appellant had to defend against, and the amendment did not mislead or prejudice the Appellant.

2. Under Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure, an Objection to an Indictment must Be Made Prior to Trial.

Under Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure, the following "must be raised prior to trial: . . . [d]efenses and objections based on defects in the indictment." Rule 12(b)(f) continues that "[f]ailure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . may constitute a waiver thereof, but the court for cause shown should

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[3]*See* W. Va. Code § 60A-4-401(a)(ii).

grant relief from the waiver." As this rule clearly states, objections to indictments must be made before the trial starts. Indeed, the rule

> requires that a defendant must raise any objection to an indictment prior to trial. Although a challenge to a defective indictment is never waived, this Court literally will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant was convicted.

Syl. Pt. 1, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996).

Additionally, "[f]or the purposes of Rule 12(b)(2) and Rule 12(f) of the West Virginia Rules of Criminal Procedure, if a defect in a charging instrument does not involve jurisdiction or result in a failure to charge an offense, a defendant must raise the issue prior to the trial or the defect will be deemed waived absent a showing of good cause for failing to timely raise the issue." Syl. Pt. 2, *State v. Tommy Y.* , 219 W. Va. 530, 637 S.E.2d 628 (2006). Thus, both statutory and case law demonstrate that an objection to a defect in an indictment must be raised before the trial begins, if not the defect is considered waived unless good cause is shown to set aside the waiver.

In this case, Appellant did not challenge the indictment until after opening statements when the State made a motion to amend the indictment. When Appellant's attorney argued against the amendment, he admitted that he had noticed that the indictment erroneously listed methamphetamine as a Schedule I controlled substance a couple days earlier. (Tr. 21.) The court inquired why Appellant's attorney had not brought this matter to the court's attention earlier, especially since several pre-trial hearings were held. (Tr. 22-23.) Appellant's attorney responded that he intended to use the error to his advantage while arguing his case to the jury. (Tr. 21.) Thus, Appellant had notice of the error in the indictment before the trial began, yet he decided not to bring it to the court's

attention because Appellant hoped that pointing out the error in the indictment would discredit the State to the jury. This decision resulted in Appellant waiving the error in the indictment.

Although a trial court may set aside a waiver for good cause, the trial court in this case properly refused to set aside the waiver because Appellant's goal of discrediting the State is not a good cause that requires a waiver to be set aside. Additionally, the indictment was not so defective that it required to be set aside because all the information in the indictment was correct except that it listed methamphetamine as a Schedule I controlled substance. It should be noted that the court requires indictments to be challenged before the trial begins "to prevent a criminal defendant from 'sandbagging' or deliberately foregoing raising an objection to an indictment so that the issue may later be used as a means of obtaining a new trial following conviction." *State v. Palmer*, 210 W. Va. 372, 376, 557 S.E.2d 779, 783 (2001).

3. An Amendment of Form of an Indictment Can Be Made Without Resubmitting the Case to the Grand Jury So Long as the Criminal Defendant Is Not Prejudiced.

In a similar case to the one at bar, a defendant was convicted of concealing and transferring stolen property from Mr. Cunningham. *State v. Adams , supra.* During jury *voir dire*, the State moved to amend the indictment to identify Mr. Morgan as the owner of the goods. *Id.*, 193 W. Va. at 280, 456 S.E.2d at 7. On appeal, the defendant argued that an amendment to a count of an indictment that changed the name of the owner of the goods he allegedly stole from violated his constitutional rights. This Court acknowledged that "[a] defendant has a right under the Grand Jury Clause of Section 4 of Article III of the West Virginia Constitution to be tried only on felony offenses for which a grand jury has returned an indictment." *Id.*, Syl. Pt. 1. It was also recognized

that in the past, any amendment to an indictment had to be resubmitted to the grand jury. *See* Syl. Pts. 4 and 5, *State v. McGraw*, 140 W. Va. 547, 85 S.E.2d 849 (1955).

However, the *Adams* Court overruled *McGraw*

> [t]o the extent that [it] stands for the proposition that "any" change to an indictment, whether it be form or substance, requires resubmission to the grand jury for its approval, it is hereby expressly modified. An indictment may be amended by the circuit court, provided the amendment is not substantial, is sufficiently definite and certain, does not take the defendant by surprise, and any evidence the defendant had before the amendment is equally available after the amendment.

Syl. Pt. 2, *State v. Adams*. This Court clarified that "[a]ny substantial amendment, direct or indirect, of an indictment must be resubmitted to the grand jury. An 'amendment of form' which does not require resubmission of an indictment to the grand jury occurs when the defendant is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced." Syl. Pt. 3, *Id.* On the other hand, a trial court cannot amend an indictment if the amendment "alters the substance of the charge . . . if it changes the pleading description of the criminal act, the mens rea accompanying the act, or the consequences of that act." *Id.* at 283, 456 S.E.2d at 10.

This Court recognized that not requiring all minor amendments to an indictment be resubmitted to a grand jury "comports with those of the vast majority of other jurisdictions that have recently addressed this issue." *Id.* at 281, 456 S.E.2d at 8. Additionally, requiring resubmission for minor amendments to indictments is financially irresponsible in that "the expense of administering justice [should] not be augmented unnecessarily by overly technical procedural rules that serve no useful purpose in criminal litigation." *Id.* at 283 n.12, 456 S.E.2d at 10 n.12. Indeed, "requiring resubmission to the grand jury of all revisions to an indictment contributes to slowing up the already overburdened machinery of the prosecution." *Id.*

In this case, amending the indictment to reflect that methamphetamine was a Schedule II controlled substance was an amendment to form. Thus, it was unnecessary to resubmit the case to the grand jury in order to amend the indictment to reflect that methamphetamine is a Schedule II substance because that was not a substantial modification to the original indictment that unfairly misled Appellant. First, the original indictment stated that Appellant was charged with delivery of a "controlled substance, namely, methamphetamine." (R. 1.) Thus, Appellant was on notice that he had been charged with distributing methamphetamine. The original indictment also stated that Appellant's delivery of a Schedule I controlled substance was in violation of West Virginia Code § 60A-4-401(a)(ii), which provides that one who delivers "[a]ny other controlled substance classified in Schedule I, II or III is guilty of a felony and, upon conviction, may be imprisoned in the state correctional facility for not less than one nor more than five years." Thus, the penalty that Appellant was subjected to is the same for both Schedule I and Schedule II controlled substances. Additionally, Appellant was not subjected to an added burden of proof as both Schedule I and Schedule II require the same proof and the evidence that Appellant had before the amendment was equally available to him after the amendment.

The trial court did not err in its decision to not dismiss the original indictment when it became known that methamphetamine is actually a Schedule II controlled substance.

> "[D]ismissal of [an] indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict' or if there is 'grave doubt' that the decision to indict was from substantial influence of such violations." *Bank of Nova Scotia v. United States*, 487 U.S. 250, [261-62], 108 S.Ct. 2369, 101 L.Ed.2d 228, 238 (1988) (citing *United States v. Mechanik*, 575 U.S. 66, 78, 106 S.Ct. 938, 945, 89 L.Ed.2d 50 (1986) (O'Connor, J., concurring)).

Syl. Pt. 6, *State ex. rel. Pinson v. Maynard*, 181 W. Va. 662, 383 S.E.2d 844 (1989).

In this case it seems unlikely that erroneously listing methamphetamine as a Schedule I controlled substance improperly influenced the grand jury's decision to indict. The members of the jury were likely unaware of the different Schedules West Virginia uses to classify controlled substances. Instead the grand jury heard testimony that Appellant had distributed methamphetamine to Katrina and chose to indict him for this illegal action. There is not "grave doubt" that the decision to indict was substantially influenced by the fact that methamphetamine was erroneously listed as a Schedule I controlled substance.

Under West Virginia law, "[g]enerally, the sufficiency of an indictment is reviewed *de novo*. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations." Syl. Pt. 2, *State v. Miller*, *supra*. Also, "[a]n indictment is sufficient under Article III, § 14 of the West Virginia Constitution and W. Va. R.Crim. P. 7(c)(1) if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy." Syl. Pt. 6,*State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999).

In this case, the indictment satisfied constitutional standards. The indictment stated the elements of the offenses charged, in that it said Appellant did "unlawfully and feloniously deliver a Schedule I controlled substance, namely, methamphetamine, to Katrina Rae Hartman, in violation of Chapter 60A, Article 4, Section 401(a)(ii) . . . against the peace and dignity of the State." (R. 1.) Next, Appellant was put on fair notice of the charges against him. The indictment specified that Appellant was accused of delivery of methamphetamine. Finally, the Appellant would have been able to assert an acquittal or a conviction in this matter to avoid being placed in double jeopardy.

V.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Hampshire County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By Counsel

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CERTIFICATE OF SERVICE

I, James W. Wegman, Assistant Attorney General for the State of West Virginia, do hereby certify that a true copy of the foregoing "Brief of Appellee State of West Virginia" was served upon counsel for the Appellant by depositing the same postage prepaid in the United States mail, this 13th day of April, 2007, addressed as follows:

To: Christopher A. Davis, Esq.
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